Nos. 09-1454 & 09-1478

Supreme Court, U.S.
FILED
JAN 28 2011
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

BOB CAMRETA,

*Petitioner,*

v.

SARAH GREENE, et al.,

*Respondents.*

JAMES ALFORD,

*Petitioner,*

v.

SARAH GREENE, et al.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## *AMICI CURIAE* BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL), CIVIL RIGHTS AND LIBERTIES COMMITTEE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION (NYCLA), AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENTS

MARK R. BROWN
*Counsel of Record*
303 E. Broad Street
Columbus, Ohio 43215
(614) 236-6590
mbrown@law.capital.edu

DAVID M. PORTER
Co-Chair, NACDL
Amicus Committee
801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of *Amici Curiae* | 1 |
| Statement of Facts | 3 |
| Summary of Argument | 5 |
| Argument | 8 |
| I. S.G.'s Detention and Two-Hour Interrogation Was a Full Seizure Within the Meaning of the Fourth Amendment | 8 |
| II. History Supports the Conclusion that Petitioners' Warrantless Seizure of S.G. Violated the Fourth Amendment | 12 |
| A. Children in the Eighteenth and Nineteenth Centuries Could Not Be Summarily Taken From Their Parents By Government Officials | 14 |
| 1. Founding to Civil War | 14 |
| 2. Post-Civil War to Twentieth Century | 17 |
| B. Twentieth-Century Reform Efforts Established Governmental Programs to Address Neglected and Abandoned Children | 20 |
| III. No Recognized Exception Justifies Dispensing With Warrants When Seizing Children | 25 |
| A. *T.L.O.* Does Not Control | 25 |
| B. Familial Privacy Is Fundamental | 28 |

TABLE OF CONTENTS – Continued

Page

C. *Lidster*'s Focus Was Brief Encounters ..... 30

IV. Familial Rights Do Not Evaporate at the Home's Threshold ..... 31

V. Summary Seizures Are Not Necessary to Achieve a Compelling Interest ..... 35

Conclusion ..... 39

# TABLE OF AUTHORITIES

Page

CASES

*Arizona v. Gant*, 540 U.S. 963 (2003) ..... 2

*Barron v. Mayor of City of Baltimore*, 32 U.S. 243 (1833) ..... 16

*Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) ..... 26, 27

*California v. Hodari D.*, 499 U.S. 621 (1991) ..... 9

*Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) ..... 15

*City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) ..... 11

*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ..... 37

*Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009) ..... 3

*Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) ..... 8

*Ferguson v. City of Charleston*, 532 U.S. 67 (2001) ..... 6, 25, 27

*Florida v. Royer*, 460 U.S. 491 (1983) ..... 5, 11

*Florida v. Thomas*, 532 U.S. 774 (2001) ..... 2

*Grayned v. City of Rockford*, 408 U.S. 104 (1983) ..... 38

*Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009) ..... 9, 12, 35, 37

TABLE OF AUTHORITIES – Continued

Page

*Greene v. Camreta*, No. 05-6047, 2006 WL 758547 (D. Ore. 2006) ..... 9

*Hoffman v. Harris*, 511 U.S. 1060 (1994) ..... 38

*Illinois v. Gates*, 462 U.S. 213 (1983) ..... 37

*Illinois v. Lidster*, 540 U.S. 419 (2004) ..... 30, 31

*Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984) ..... 8

*In re Gault*, 387 U.S. 1 (1967) ..... 22, 23, 24, 38

*Johnson v. Sackett*, 793 So.2d 20 (Fla. App. 2001) ..... 38

*Kalmanson v. Lockett*, 848 So.2d 374 (Fla. App. 2003) ..... 35

*Kolender v. Lawson*, 461 U.S. 352 (1983) ..... 38

*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) ..... 30

*M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) ..... 30

*Mapp v. Ohio*, 367 U.S. 643 (1961) ..... 22

*Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) ..... 8, 36, 37

*McCabe v. Life-Line Ambulance Service*, 77 F.3d 540 (1st Cir. 1996) ..... 9

*Meyer v. Nebraska*, 262 U.S. 390 (1923) ..... 29

*Michigan v. Chesternut*, 486 U.S. 567 (1988) ..... 8

*Mincey v. Arizona*, 437 U.S. 385 (1978) ..... 35

*New Jersey v. T.L.O.*, 469 U.S. 325 (1985) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

*New York v. Burger*, 482 U.S. 691 (1987) .....25

*Newton v. Burgin*, 414 U.S. 1139 (1974).....35

*Ornelas v. United States*, 517 U.S. 690 (1996) .....38

*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).....15, 38

*Payton v. New York*, 445 U.S. 573 (1980).....13, 28, 29

*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).....29

*Rasul v. Bush*, 542 U.S. 466 (2004).....2

*Reno v. Flores*, 507 U.S. 292 (1993) .....9

*Robinson v. California*, 370 U.S. 660 (1962) .....32

*Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009) .....*passim*

*Santosky v. Kramer*, 455 U.S. 745 (1982).....30

*Schmerber v. California*, 384 U.S. 757 (1966).....26

*Skilling v. United States*, 130 S. Ct. 2896 (2010).....32

*Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).....26

*Stanley v. Illinois*, 405 U.S. 645 (1972).....6, 30

*Terry v. Ohio*, 392 U.S. 1 (1968) .....11, 12

*Thornton v. United States*, 541 U.S. 615 (2004).....2

*Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).....26

*Troxel v. Granville*, 530 U.S. 57 (2000).....29, 30

TABLE OF AUTHORITIES – Continued

Page

*United States v. Mendenhall*, 446 U.S. 544 (1980) ..... 8, 10, 11

*United States v. Watson*, 423 U.S. 411 (1976) ..... *passim*

*Villanova v. Abrams*, 972 F.2d 792 (7th Cir. 1992) ..... 8

*Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975) ..... 2

*Walsh v. Erie County Department of Job and Family Services*, 240 F. Supp. 2d 731 (N.D. Ohio 2003) ..... 14

*Wernecke v. Garcia*, 591 F.3d 386 (5th Cir. 2009) ..... 9

*Winston v. Lee*, 470 U.S. 753 (1985) ..... 28

FEDERAL STATUTES

Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) ..... 21

Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) ..... 21

Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) ..... 21

42 U.S.C. § 1983 ..... 4

STATE STATUTES

ALA. CODE § 12-15-125(a) ..... 36

ARIZ. REV. STAT. §§ 8-303 & 8-821 ..... 36

TABLE OF AUTHORITIES – Continued

Page

GA. CODE ANN. § 15-11-45 ..... 36

N.D. CENT. CODE § 27-20-13 ..... 36

OR. REV. STAT. § 419B.150(1)(a) ..... 14

PA. CONSOL. STAT. ANN. § 6324 ..... 36

WIS. STAT. § 48.19(d) ..... 36

RULES

S. Ct. Rule 37.3 ..... 1

S. Ct. Rule 37.6 ..... 1

MISCELLANEOUS

WILLIAM BLACKSTONE, COMMENTARIES ..... 15

Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913 (2004) ..... 36

Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540 (2004) ..... 34

Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765 (1999) ..... *passim*

Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190-91 (1971) ..... 16, 17

TABLE OF AUTHORITIES – Continued

Page

Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001) ..... 16

Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEORGETOWN L.J. 299 (2002) ..... 15, 18, 19, 20

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2 (2010) ..... 11

WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2010) ..... 32

Model Juvenile Court Act, § 13(a)(1), 9A U.L.A. 22 (1968) ..... 23

Model Juvenile Court Act, § 13(a)(2), 9A U.L.A. 22 (1968) ..... 23

Model Juvenile Court Act, § 13(a)(3), 9A U.L.A. 22 (1968) ..... 23

Model Juvenile Court Act, § 13(a)(4), 9A U.L.A. 22 (1968) ..... 23

Model Juvenile Court Act, § 14, 9A U.L.A. 22 (1968) ..... 23

Model Juvenile Court Act, § 15(a)(1), 9A U.L.A. 22 (1968) ..... 23

Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461 ..... 38

TABLE OF AUTHORITIES – Continued

Page

Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAROLINA L. REV. 205, 210 (1971) .....15

Harold A. Richman, *From a Radiologist's Judgment to Public Policy on Child Abuse and Neglect: What Have We Wrought?*, 30 PEDIATRIC RADIOLOGY 219, 220 (2000) .....20, 21, 29, 33, 34

William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 891 (1991) .....38, 39

William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. Rev. 842, 848 (2001) .....38

Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257 (1964) ....15, 16

Marvin Ventrell, *From Cause to Profession: The Development of Children Law and Practice*, 32 Jan. COLO. LAW. 65 (2003) .....16, 17, 18

United States Department of Health and Human Services Administration for Children and Families, Appendix G: Highlights of Child Maltreatment 2003, http://www.acf.hhs.gov/programs/cb/pubs/cwo03/appendix/appendixg.htm (last visited January 4, 2011) .....33

## INTEREST OF *AMICI CURIAE*[1]

1. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has previously filed *amicus curiae* briefs in this Court in cases, like the present one, involving the validity of searches and

---

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondents have filed a global consent to *amici* filings, and letters of consent to the filing of this brief from petitioners have been lodged with the Clerk of the Court pursuant to Rule 37.3.

seizures under the Fourth Amendment. *See, e.g., Thornton v. United States,* 541 U.S. 615 (2004); *Arizona v. Gant,* 540 U.S. 963 (2003); *Florida v. Thomas,* 532 U.S. 774 (2001).

2. The Civil Rights and Liberties Committee of the New York County Lawyers' Association ("NYCLA") was established in 1938. The Committee sponsors forums, prepares reports and helps coordinate *pro bono* projects on topics such as advocacy for the indigent, education and employment for ex-offenders, collateral consequences of convictions, and bullying in the schools. NYCLA, a 9,000-member bar association, was established in 1908 with a policy that any lawyer admitted to practice could join regardless of race, religion, gender or ethnicity.

3. The Center for Constitutional Rights is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center has litigated numerous landmark civil and human rights cases, many of which have focused on ensuring the fair and humane treatment for all persons involved in the American criminal justice system. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004); *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975).

## STATEMENT OF FACTS[2]

Petitioner-Camreta is an investigator for the Oregon Department of Human Services (ODHS). Petitioner-Alford is a deputy sheriff. Respondent, Sarah Greene, is the mother of a nine-year-old girl (S.G.)[3] who was forcibly removed from her elementary school and interrogated for two hours by Petitioners, who admittedly did not have probable cause, a warrant, exigent circumstances, or Respondent's consent.

Petitioners' seizure of S.G. was based on a report received by ODHS on or about February 19, 2003. S.G.'s father, Nimrod Greene, was arrested on February 12, 2003 for allegedly abusing another child, F.S., the seven-year-old son of a family that employed Greene. F.S.'s mother reported at this same time her concern that Greene might be abusing S.G.

Approximately four days after this report was made, Camreta and Alford went to S.G.'s elementary school and had her removed from her classroom. Alford was armed and in uniform at the time of the seizure. Petitioners isolated S.G. in a private room at the elementary school in order to question her. The questioning lasted for two hours. At the end of the

---

[2] Because the District Court granted summary judgment to Petitioners, Respondents' version of the facts is taken as true and all reasonable inferences are drawn in Respondents' favor. *See Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846, 849 n. 1 (2009).

[3] S.G. and her younger sister, K.G., represented by their mother, are also Respondents.

questioning, S.G. finally told Petitioners what they wanted to hear – that Greene had abused her. Notwithstanding the seriousness of this revelation, Petitioners allowed S.G. to return home to her father.

On March 6, 2003, Greene was charged with abusing F.S. and S.G. He was shortly released and ordered not to have any contact with S.G. or her younger sister, K.G. On March 11, 2003, Camreta obtained a court order placing S.G. and K.G. in foster care, where they remained until March 31, 2003.

Given a lack of credible evidence that they had been abused, the court on March 31, 2003 returned S.G. and her sister to Respondent's custody. Greene was later tried for his alleged sexual abuse of F.S. and S.G., but was not convicted. When the jury could not reach a verdict, he pleaded guilty to a lesser charge based on the allegations involving F.S. Greene received no jail time. The charges involving S.G. were dismissed.

Respondent filed this action on behalf of herself and S.G. against Petitioners (in their individual capacities) under 42 U.S.C. § 1983, alleging, *inter alia*, that S.G.'s seizure and two-hour interrogation violated the Fourth Amendment. The District Court concluded that S.G. was seized, but concluded that it was reasonable within the meaning of the Fourth Amendment. On appeal, Petitioners conceded that S.G. had been seized. Contrary to the District Court's holding, the Ninth Circuit ruled that S.G.'s two-hour detention and interrogation, with the assistance of

law enforcement and without a warrant, violated the Fourth Amendment.

## SUMMARY OF ARGUMENT

1. Petitioners conceded below that S.G.'s two-hour detention and interrogation by Petitioners was a seizure. The Court of Appeals relied on this concession to hold that Petitioners violated the Fourth Amendment. Petitioners cannot now change the question presented to this Court to seek an advisory opinion on whether S.G.'s seizure was simply justified "at its inception." A seizure's being justified "at its inception" does not mean that it satisfies the Fourth Amendment. This Court has held on a number of occasions that justifiable stops can mature with time or intrusion into unconstitutional seizures. *See, e.g., Florida v. Royer,* 460 U.S. 491 (1983). *Safford Unified School District No. 1 v. Redding,* 129 S. Ct. 2633 (2009), specifically ruled that a justifiable stop in school will demand more as it becomes more intrusive. Consequently, even if S.G.'s warrantless stop was justified at its inception (and consistent with the Fourth Amendment), its duration and intensity caused it to mature into an unconstitutional seizure.

2. History teaches that the Framers in the last quarter of the Eighteenth Century would not have countenanced government's meddling with America's families. They would not have allowed government officials to take children because of alleged abuse.

Simply put, the Founders did not consider raising and rearing children government's business. Warrantless rescues based on claimed abuse would therefore not have been tolerated. Nor did such a practice exist at the time the Fourteenth Amendment was adopted. Government's concern with child safety did not coalesce until the middle of the Twentieth Century. Indeed, the Nation's most recent protective efforts defined in terms of "dependency" and "neglect" did not emerge until the 1960s. By this time, the Fourth Amendment had been incorporated; it was understood that court orders and warrants were needed to separate children from their parents.

3. Seizures at the hands of law enforcement officers cannot be justified by "special needs." *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is predicated on school authorities attempting to maintain discipline in schools. This Court has steadfastly refused to extend this "special needs" exception to criminal law enforcement. *See Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Further, even if the seizure here were perpetrated by only protective service investigators, it would still fall beyond the pale of *T.L.O.* As made clear in *Redding*, some seizures are simply too invasive to rely only on reasonable suspicion. This is true of familial rights. America's right to family is one of the oldest and most basic of constitutional freedoms. It has routinely been afforded heightened procedural protection. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). Children and families deserve the utmost constitutional protection.

4. Any distinction between the confines of "the home" and "other" places, *see, e.g., United States v. Watson,* 423 U.S. 411 (1976), does not control. Familial rights do not evaporate at a house's threshold. Although adults and juveniles can be arrested outside their homes without warrants, this does not mean that children can be taken into protective custody without warrants just because they are in their yards or at school. Dependency laws and delinquency laws have different histories. While warrantless arrests have historically been allowed outside homes, history has not recognized that children can be taken from parents under this same model. Further, because of reporting requirements, broad definitions and the lack of experienced investigators, the risk of error in rescuing children from alleged abuse is large. Arrests in public places for criminal behavior, though not always correct, are not routinely wrong, either. The opposite is true with removals, rescues and temporary seizures.

5. Petitioners have not demonstrated that the basic warrant process facilitates child abuse. They have produced no evidence showing that parents routinely refuse to cooperate in child abuse investigations. Nor have they shown that children in states that require warrants are subject to more abuse than those in states, like Oregon, that do not. Petitioners have not established that warrants are unworkable or place paralyzing costs on Oregon's protective services system. Petitioners have therefore failed to prove that

their alternative is absolutely necessary to protect children. They have not satisfied strict scrutiny.

## ARGUMENT

### I. S.G.'s Detention and Two-Hour Interrogation Was a Full Seizure Within the Meaning of the Fourth Amendment.

The meaning of "seizure" extends beyond formal arrests. Even in the absence of handcuffs and bookings, a person is seized by police if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).[4]

The Fourth Amendment, moreover, is not limited to criminal suspects and police investigations. It applies in civil settings, *see, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984), and restricts teachers' actions, *see, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985), as well as those of protective service investigators. *See, e.g., Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003). Whether a civil commitment, *see, e.g., Villanova v. Abrams*, 972 F.2d 792,

[4] Although Justice Stewart's formulation in *Mendenhall* only garnered plurality support, it has since been adopted by a majority. *See, e.g., Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

795 (7th Cir. 1992); *McCabe v. Life-Line Ambulance Service*, 77 F.3d 540 (1st Cir. 1996), arrest, *see, e.g., California v. Hodari D.*, 499 U.S. 621, 624 (1991), search within a public school, *see, e.g., Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), or removal from the home, *see, e.g., Wernecke v. Garcia*, 591 F.3d 386 (5th Cir. 2009); *cf. Reno v. Flores*, 507 U.S. 292, 317 (1993) (O'Connor, J., concurring) (observing that children "have a protected liberty interest in 'freedom from institutional restraints'"), the Fourth Amendment protects children.

Petitioners conceded below that S.G.'s detention and two-hour interrogation was a "seizure" within the meaning of the Fourth Amendment. The Ninth Circuit observed that "Camreta and Alford do not contest the district court's holding that *the two-hour interview* of S.G. at her school was a seizure. We agree . . . that it was." *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009) (emphasis added). The District Court, for its part, applied *Mendenhall*, 446 U.S. at 554, to conclude that, "in view of all of the circumstances surrounding the incident," *Greene v. Camreta*, No. 05-6047, 2006 WL 758547, at *3 (D. Ore. 2006), "S.G. was seized." *Id.* The issue framed by the Court of Appeals was therefore "relatively straightforward": "whether an in-school *seizure and interrogation* of a suspected child abuse victim *is always permissible* under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant, as defendants maintain." *Greene*, 588 F.3d at 1022 (emphasis added). The Ninth Circuit concluded that

warrantless seizures accompanied by lengthy interrogations in school settings are not "always permissible"; rather, when they involve police, lasts for two hours, and satisfy *Mendenhall*'s definition of a seizure, they are not. *Id.* at 1030.

Camreta argues that even though S.G. was fully seized – that is, even though S.G. was forcibly taken from her classroom and interrogated for two hours – Petitioners' actions were justified "at their inception" by reasonable suspicion. *See* Brief for Camreta at 38-40. The Ninth Circuit therefore was wrong in holding that S.G.'s two-hour ordeal violated the Fourth Amendment. There is no need Camreta argues, nor would it even be proper, to consider the length of S.G.'s detention and the circumstances under which she was interrogated. *See* Brief for Camreta at 40.

Camreta's argument ignores both the Fourth Amendment question put by Petitioners to this Court and Fourth Amendment jurisprudence. The Fourth Amendment question presented included no language limiting review to the validity of S.G.'s detention "at its inception." Petitioners broadly asked this Court to review whether the Ninth Circuit's Fourth Amendment holding was correct. In the absence of limiting language in their Petitions, and in light of the concessions below, the question presented here necessarily includes the totality of circumstances used by the District Court to find that S.G. did not reasonably feel free to leave within the meaning of *Mendenhall*.

Searches and seizures, of course, can be justified at their inception and still violate the Fourth Amendment. *See* 4 WAYNE LAFAVE, SEARCH AND SEIZURE § 9.2 (2010). A valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968), for example, will mature into a Fourth Amendment violation if it lasts too long or becomes too invasive. *See, e.g., Florida v. Royer*, 460 U.S. 491 (1983). That a student is justifiably seized and searched under the logic of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), does not mean that she can be forced to disrobe. *See Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009). Here, the Ninth Circuit concluded that S.G.'s detention and two-hour interrogation by Petitioners under all the facts and circumstances violated the Fourth Amendment. There was no need for it to go back to assess whether S.G.'s stop was justified "at its inception."[5] Regardless of whether it was, what happened over the course of two hours violated the Fourth Amendment.[6]

* * *

---

[5] Camreta purposely confuses what is necessary with what is sufficient. Seizures necessarily must be justified at their inception to survive the Fourth Amendment. *See Mendenhall*. However, this does not mean all seizures that are initially justified are valid. *See Royer*.

[6] Camreta may not even have standing to make this "inception" argument before this Court. After all, success on this newly framed, limited issue would not alter the Ninth Circuit's ruling that S.G.'s two-hour seizure and interrogation violated the Fourth Amendment. It would afford them no relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Petitioners argued below that warrantless seizures of students are *always permissible*. *See Greene*, 588 F.3d at 1022. The District Court agreed. The Court of Appeals reversed. The question before this Court is whether the Ninth Circuit was correct. Are warrantless seizures and interrogations of students based on mere suspicion *always permissible*? Are they permissible when they include two hours of questioning in the presence of law enforcement officers? *Amici* agree with Respondents that they are not.[7]

## II. History Supports the Conclusion that Petitioners' Warrantless Seizure of S.G. Violated the Fourth Amendment.

At common law, "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest." *United States v. Watson*, 423 U.S. 411, 418 (1976). This was also "the prevailing rule under state constitutions and statutes" when the Fourth Amendment was

[7] Note that the Ninth Circuit did not rule that all seizures of students must be accompanied by warrants. It did not decide whether brief, *Terry*-type stops of students require warrants (or even require cause greater than reasonable suspicion). It did not address whether lengthy interrogations by school authorities, or social workers in the absence of law enforcement assistance, require probable cause, let alone warrants.

adopted. *Id.* at 419. Because the Second Congress adopted this standard in the late Eighteenth Century and "plainly decided against conditioning warrantless arrest power on proof of exigent circumstances," *id.* at 423, this Court in *Watson* assumed that the Framers of the Fourth Amendment could not have meant to displace it. Warrantless felony arrests are thus generally acceptable under the Fourth Amendment – at least when they occur outside the home. *See Payton v. New York*, 445 U.S. 573, 588 (1980).

History is plainly important to the Constitution's meaning. If children were routinely being taken by government officials without warrants in the late Eighteenth Century, that would lend credence to the claim that the Fourth Amendment was not meant to prohibit these removals. The converse is also true; if children were not being taken by government officials at the Founding, with or without warrants, one could conclude that the Framers did not mean to authorize future warrantless seizures. Indeed, if familial rights were considered inviolate at the Founding, one could conclude that the Framers did not even consider warrantless seizures of allegedly neglected children a legal possibility.

Children of white, property-owning fathers (who formed the Nation's original political community) could not be taken by government officials at the Founding, with or without prior judicial authorization. Nor had such a practice emerged by the time the Fourteenth Amendment was adopted following the

Civil War. Taking children from parents because of "dependency," "neglect," or "abuse" is a modern development that emerged in the last quarter of the Twentieth Century. Further, this most modern reform effort, at its inception, assumed that warrants would be required. Only within the last generation have states, like Oregon, moved toward a summary removal model.[8] Petitioners essentially ask this Court to bless, for the first time, a "social worker exception to the strictures of the Fourth Amendment." *Walsh v. Erie County Department of Job and Family Services*, 240 F. Supp. 2d 731, 746-47 (N.D. Ohio 2003) (refusing to recognize this exemption).

### A. Children in the Eighteenth and Nineteenth Centuries Could Not Be Summarily Taken From Their Parents By Government Officials.

#### 1. Founding to Civil War

A father's right to the care, custody and control of his children is of ancient origin. Blackstone's Commentaries, published in 1765, observed that "'[t]he ancient Roman laws gave the father a power of life and death over his children; upon this principle, that

---

[8] Oregon law authorizes warrantless removals "[w]hen the child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare. . . ." OR. REV. STAT. § 419B.150(1)(a). As the present case demonstrates, Oregon officials also assume the authority to temporarily seize children without obtaining warrants.

he who gave had also the power of taking away. . . .'" Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEORGETOWN L.J. 299, 310 (2002) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *440). Blackstone observed that "children lived in 'the empire of the father' until they reached twenty-one," *id.* (citing BLACKSTONE at *441), and the father's common law "right to the custody, labor, and earnings of his minor children" was sacred. *Id.* at 310. Government therefore had little (if any) room to interfere with a father's right to raise his children.

Blackstone's common law deference to fathers, of course, did not abolish slavery. Nor did it override Elizabethan "Poor Laws" that were enacted following the disintegration of England's feudal age. *See* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAROLINA L. REV. 205, 210 (1971). Not only did Poor Laws allow the imprisonment of poor parents, *see Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 n. 4 (1972) (describing the history behind "Elizabethan Poor Laws"); *Central Virginia Community College v. Katz*, 546 U.S. 356, 365 n. 4 (2006) (noting that England did not abolish imprisonment for debt until 1869), they authorized the removal of children from poor families. *See* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257, 279 (1964). Children from poor families were impressed into the service of more prosperous families. *Id.*

The American Colonies received and recognized Blackstone's description of familial rights. They also, unfortunately, embraced England's Poor Laws, just as they recognized slavery. Church wardens and overseers in the Colonies took poor children from their homes and impressed them into the service of others. *See* Marvin Ventrell, *From Cause to Profession: The Development of Children Law and Practice*, 32-Jan. COLO. LAW. 65, 66 (2003); tenBroek, *supra*, at 279.

States in antebellum America – free from the constraints of the Fourth Amendment, *see Barron v. Mayor of City of Baltimore*, 32 U.S. 243 (1833) – continued this practice. During the "House of Refuge Movement" of the early Nineteenth Century, "delinquent" children were regularly snatched from streets and sent to institutions. *See* Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1158 (2001). The onslaught of immigration forced States to forego indentures in favor of reformatories and "houses of refuge." As an adjunct to "almshouses," which confined poor adults, these houses institutionalized poor children. *See* Ventrell, *supra*, at 66.[9]

---

[9] New York's law (enacted in 1824), for example, provided a charter to the Society for the Reformation of Juvenile Delinquents to erect a "House of Refuge" for minor vagrants, delinquents and criminals. *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190 (1971).

Their names notwithstanding, houses of refuge were not designed to shelter or protect children; "the undertaking was a matter of crime and delinquency protection, aimed at saving predelinquent youth." Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190-91 (1971). The Movement's essential thesis was that poverty correlated with "moral degeneracy." *Id.* at 1198. Removing poor children (and their parents) from the population-at-large ridded society of actual or potential moral deviants, offered correction and advanced crime control. *Id.* at 1207. It was no more benevolent or benign than slavery, which remained a facet of early American life.

### 2. Post-Civil War to Twentieth Century

Reform efforts geared toward protecting children – as opposed to protecting society from children – did not emerge until *after* the adoption of the Fourteenth Amendment. The genesis of this post-Civil War reform movement can be found in two celebrated child abuse cases tried in New York City in 1871 and 1874, respectively. *See* Ventrell, *supra*, at 66 (discussing cases involving Emily (1871) and Mary Ellen (1874)). Both cases involved children who had been abused by their parents or guardians. Henry Bergh, the founder of New York's Society for the Prevention of Cruelty to Animals, used "a writ de homine replegiando (similar to a writ of habeas corpus), . . . to remove the girls and ultimately have them placed by the New York Special Sessions Court in safe care. It is

not clear under what authority the court acted; it probably saw itself as exercising its equitable authority, having taken criminal jurisdiction over the abusers." *Id.* These two cases spawned the creation of the New York Society for the Prevention of Cruelty to Children in 1874. *Id.*

In the years that followed, more communities followed suit. "Led by their wealthy private philanthropists, [these societies] amassed unprecedented legal authority to scrutinize parental behavior, arrest parents, and remove thousands of children." Hasday, *supra*, at 302. Most often, society agents simply "followed children back to their homes," *id.* at 307, arrested their parents and seized the children. *Id.* Because removals were parcel to the arrests of the parents, they occurred without prior or accompanying judicial process. Process came, if at all, as part of the subsequent criminal proceedings against the parents.[10] Even though the New York Reform Movement's mandate ostensibly was protection, it continued to labor under a distinction between rich and poor.

---

[10] "Once a child had been removed from her parents at the New York society's instigation or with its help," moreover, "the courts were extremely reluctant to allow visitation or to release the child, unless the society agreed." *Id.* at 308. In twenty years (1881-1900), the New York society brought "52,860 criminal cases, resulting in 49,330 convictions (a 93.3% success rate). During the same period, the society removed 90,078 children with judicial approval. It exercised enormous discretion over their placement, and put the overwhelming majority in institutions." *Id.* at 307-08.

"From the start, [the New York Society] focused on families that had not been successful in the wage labor economy, operating on the principle that this economic failure had been caused by some crucial moral or character flaw." Hasday, *supra*, at 304-05.

Despite Elizabethan Poor Laws, the House of Refuge Movement, and Henry Bergh's private efforts in New York,[11] "[o]ver the entire course of the nineteenth century, common law courts and legal writers in the United States remained highly respectful of the control that parents, particularly fathers, exercised over their households and children, and *committed to doctrines that made legal intervention to counter parental excess or abuse very unlikely*." *Id.* at 311 (emphasis added). Even though slavery and Poor Laws co-existed with these protective doctrines, the understood rule was clear and inviolate: children simply could not be taken with or without warrants from citizens who formed America's political community.

---

[11] At the close of the Nineteenth Century, Bergh's movement ceded control to state and local administrative bodies. *See* Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765, 766 (1999).

### B. Twentieth-Century Reform Efforts Established Governmental Programs to Address Neglected and Abandoned Children.

In the first quarter of the Twentieth Century, several States passed "mothers' pension laws." *See* Hasday, *supra*, at 348. These laws

> authorized local governments to provide direct financial support to poor mothers, [and] differed from the child cruelty societies in two important institutional respects. . . . First, [they] established completely governmental programs. . . . Second, and more crucially, [they] primarily accomplished their aims through the provision and refusal of much needed financial aid, building on a growing consensus among reformers of the period that this strategy was both more effective, and more cost-efficient, than removing children from their parents' custody.

*Id.* By mid-Century "all states had government agencies that provided statewide services to abused, neglected, and abandoned children." Davidson, *supra*, at 767. This was fueled by federal spending measures, such as the Aid to Dependent Children Act, which was passed as part of the Social Security Act of 1935. *See* Hasday, *supra*, at 357.

The medical community took note of what modern Americans now know to be "child abuse" in 1946, when Dr. John Caffey reported the case histories of six "battered" children. *See* Harold A. Richman, *From*

*a Radiologist's Judgment to Public Policy on Child Abuse and Neglect: What Have We Wrought?*, 30 PEDIATRIC RADIOLOGY 219, 220 (2000). The dialogue that followed "began the modern era in our understanding of child abuse and our response to it." *Id.* In 1961, the American Academy of Pediatrics organized its first conference on "The Battered Child Syndrome." *Id.* The first model child abuse law was drafted at this conference. *Id.* The following year, a report by the same name was published in the Journal of the American Medical Association. *Id.* It "brought the problem [of child abuse] to a wider audience, not only in medicine but in government as well. . . ." *Id.* By 1966, "every state in the Union passed a child-abuse reporting law." *Id.*[12]

Once abuse laws and reporting requirements were in place, the problem turned to process: how could local authorities respond to reported instances of abuse? Should children be followed home and kidnapped following the arrest of their parents, as was true with the private societies that emerged in the last quarter of the Nineteenth Century? Should

---

[12] In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974), which marked "its first direct action to address child maltreatment within the home. . . ." Davidson, *supra* note 13, at 776. In 1980 and 1997, Congress passed additional spending measures, the Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980), and the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997), respectively. It has never addressed the problem presented here.

discretion be left with church wardens and overseers to indenture children, as was true in the late Eighteenth Century?

While the first half of the Twentieth Century saw little change in the procedures that accompanied the institutionalization of children (and incarceration of adults), the incorporation of the Bill of Rights – in particular, the full application of the Fourth Amendment to state and local activities, *see, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) – caused dramatic procedural changes throughout the States in the second half of the Century. Before 1967, juveniles were commonly subjected to detention without procedural protections. *See In re Gault*, 387 U.S. 1, 11 n. 7 (1967). As explained in *Gault*, 387 U.S. at 15, "[t]he early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jail with hardened criminals." These early reformers thus discarded the "apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law" for juvenile delinquents. *Id.* They left juveniles with promises of compassion and fairness as opposed to process.

The Court in *Gault*, 387 U.S. at 18, rightly saw through this guise: "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." The Court reminded modern Americans of what the Founders knew well –

governmental claims of compassion and protection are "poor substitute[s] for principle and procedure."

Following *Gault*'s landmark holding, the National Conference of Commissioners on Uniform State Laws presented its recommendation for implementing the changes needed to America's juvenile justice system in 1968. The result was the Uniform Juvenile Court Act of 1968 ("the Model Juvenile Court Act" or "Model Act"); this model law purported to implement changes needed in America's juvenile justice system to comply with the Constitution. It distinguished between procedures that should be followed with dependent children and those that should be followed with delinquents: a child could only be "taken into custody" "pursuant to an order of the court under this Act," Model Juvenile Court Act, § 13(a)(1), 9A U.L.A. 22 (1968), or "pursuant to the laws of arrest." *Id.* § 13(a)(2).

The Model Act provided exceptions for a "child [ ] suffering from illness or injury or [ ] in immediate danger from his surroundings," as well as a child who "has run away from his parents, guardian, or other custodian." *Id.* § 13(a)(3) & (4). Even then the Model Act required that the child be immediately returned to its parents "upon their promise to bring the child before the court when requested," *id.*, § 15(a)(1), unless the child's parents presented a flight risk. *Id.* § 14. The Model Act expressed a clear preference for prior judicial involvement and supervision in dependency and abuse proceedings. Unilateral, summary seizures were only permissible in emergencies, and

even then the Model Act required the immediate return of children to their parents.

* * *

Three important conclusions can be drawn from this historical outline: First, the Framers would not have countenanced government's meddling with families. Never would they have allowed governmental agents to take their children because of alleged "abuse." Simply put, the Founders did not consider raising and rearing children government's business. Warrantless rescue based on claimed abuse was not tolerated.

Second, the Drafters of the Fourteenth Amendment would not have tolerated governmental interference. Private concerns over "child abuse" did not arise until after the Civil War. Government did not embrace this end until the beginning of the Twentieth Century. When this happened, government officials were not yet constrained by federal constitutional norms. As a constitutional matter, local authorities during the first half of the Century were free to exercise "unbridled license" over children – and they did (as noted in *Gault*).

Third, the most modern reform effort – which vastly expanded notions of abuse, neglect and dependence – emerged with knowledge of the constraints of the Fourth and Fourteenth Amendments. The Model Act of 1968 followed on the heels of *Gault* and codified this Court's post-incorporation holdings. As a result, the Model Act stated that children cannot

be taken "into custody" without court orders. Society's most recent "child protection" system was predicated on this assumption. By 1968, it was clear that children could not be routinely taken from their parents without judicial authorization.

## III. No Recognized Exception Justifies Dispensing With Warrants When Seizing Children.

Circumstances sometimes excuse compliance with the Fourth Amendment's warrant requirement. "Closely regulated" businesses and industries, for example, are not protected from warrantless searches. *See, e.g., New York v. Burger*, 482 U.S. 691 (1987). Today, these exceptions to the Fourth Amendment's probable cause and warrant requirements are described as "special needs." Critical to this exception is the intersection of a diminished expectation of privacy and a governmental objective "other than the normal need for law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n. 7 (2001). Where individual expectations of privacy are high, this exception rarely applies. And where government uses crime-control laws as leverage, or employs criminal law enforcement personnel, it must fully comply with the Fourth Amendment's basic requirements.

### A. *T.L.O.* Does Not Control.

Because the seizure in the present case occurred at S.G.'s school, Petitioners argue that *New Jersey v.*

*T.L.O.*, 469 U.S. 325 (1985), controls. The Court's holding there, however, was premised not on the student's mere presence in the school; rather, the Court relied on the fact that the *school authorities* conducted the search to maintain *school discipline*. *T.L.O.* cannot be read to award protective service investigators and police officers similar authority simply because a child is temporarily on school property.

*T.L.O.*, like all special needs cases, made clear that it was not to be read broadly. "Special needs" does not mean law enforcement. For example, while governmental agents are subject to warrantless (even suspicionless) drug testing, *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); and students who participate in extra-curricular activities can likewise be tested, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the great majority of America's citizenry remains protected by the Fourth Amendment's warrant requirement. *See, e.g., Schmerber v. California*, 384 U.S. 757, 771-72 (1966). The Court in *Earls* emphasized that the testing program at issue was "not in any way related to the conduct of criminal investigations. . . ." *Id.* at 829. The test results were "not turned over to any law enforcement authority," nor would they "lead to the imposition of discipline or have any academic consequences." *Id.* at 833. The school district's concern was

simply "detecting and preventing drug use among its students." *Id.* at 825.

*Ferguson v. City of Charleston*, 532 U.S. 67 (2001), stands in stark contrast to *Earls* and the exception it represents. *Ferguson* addressed a public hospital's use of drug testing to deter pregnant women from using crack cocaine. Urine screens were performed on maternity patients and test results were used to leverage patients into formal treatment programs. *Id.* at 72. Those who refused were referred to law enforcement officials for prosecution. *Id.* at 72-73. Potential charges included child neglect and unlawful delivery of a controlled substance to a child. *Id.*

Because the program was not "divorced from the State's interest in law enforcement," *id.* at 79, but instead used "law enforcement to coerce the patients into substance abuse treatment," *id.* at 80, the Court concluded that it did not qualify for treatment under the special needs exception. Even though the hospital's "benign" motives included protecting children, *id.* at 85, concededly "a serious problem," *id.* at 86, the program's "pervasive involvement" with law enforcement rendered it unqualified for the special needs exception. "[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Id.* at 86. As pointed out by Justice Kennedy, 532 U.S. at 88 (Kennedy, J., concurring): "None of [the Court's] special needs precedents has sanctioned the routine inclusion of law enforcement

. . . to implement the system designed for the special needs objectives."

### B. Familial Privacy Is Fundamental.

Even assuming that the present case were divorced from law enforcement, the special needs exception would still not apply. S.G.'s seizure and interrogation were too intrusive. The Court ruled in *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), that students suspected of violating school rules could not be strip-searched pursuant to *T.L.O.*'s reasonable suspicion standard, even though the school was attempting to maintain order and police were not involved. The "patent intrusiveness" of such a search, 129 S. Ct. at 2641, the Court concluded, demanded "distinct elements of justification." *Id. Redding* makes clear that individual privacy concerns sometimes overcome relaxed special needs standards. Searching a purse is one thing, *see T.L.O.*; stripping a student is another. *See Redding*.[13]

*Payton v. New York*, 445 U.S. 573, 588 (1980), likewise ruled that fundamental privacy interests cannot be trusted to executive license. *Watson*, of course, had ruled that arrests outside the home could proceed without warrants because historically that

[13] Indeed, some bodily intrusions are so invasive that they are not allowed to proceed even when police have fully complied with the Fourth Amendment's terms and obtained a warrant. *See, e.g., Winston v. Lee*, 470 U.S. 753, 766 (1985).

was the rule. But this was also the common law rule for felony arrests inside the home. *See Payton,* 445 U.S. at 616 (White, J., dissenting). Still, the Court rejected this historical argument in favor of protecting privacy: "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." *Id.* at 588.

This same rationale applies to familial privacy – inside and outside the home. One's right to family cannot depend on location. It follows the family. Lengthy seizures and interrogations of young children about sexual matters and family intimacies jeopardize familial privacy whether conducted inside or outside the home. The magnitude of these invasions is not just spatial, it is, as explained in *Redding,* physical, emotional and psychological. An interrogation of this nature may very well forever define the family. Its impact not only falls on "the family's view of itself," but also "on the view of the family held by those consulted in the investigation[.]" Richman, *supra,* at 223.

This Court has long recognized a basic, fundamental right to raise children. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Troxel v. Granville*, 530 U.S. 57, 66 (2000), the Court stated that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care,

custody, and control of their children." These rights, the Court observed, are "perhaps the oldest of fundamental liberty interests recognized by this Court." *Id.* at 65.

Heightened procedural protections, moreover, have routinely been extended to families. In *Stanley v. Illinois*, 405 U.S. 645 (1972), for example, the Court ruled that a father (as well as a mother) "as a matter of due process" is "entitled to a hearing on his fitness as a parent *before* his children were taken from him. . . ." *Id.* at 647. This logic naturally extends to both temporary and permanent takings: "Surely, . . . if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and *the children suffer from uncertainty and dislocation.*" *Id.* (emphasis added). *See also Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

### C. *Lidster's* Focus Was Brief Encounters.

Recognizing the strained analogy to *T.L.O.* and other special needs precedents, Petitioners rely on *Illinois v. Lidster*, 540 U.S. 419 (2004), for support. There, the Court approved brief stops of motorists at highway checkpoints in order to elicit information about a crime that had occurred in the vicinity. *Lidster* hardly helps Petitioners' case. The Court in *Lidster* repeatedly relied on the brevity of the stops to support their validity. *See, e.g.*, 540 U.S. at 424

(distinguishing the case as involving "brief, information-seeking highway stops"). They were not designed to last more than a few minutes. The Court did not hold that law enforcement officers may seize adults (let alone young children) without probable cause in order to engage in hours-long questioning. *Lidster*, moreover, hinged on information-seeking stops in non-coercive and non-invasive environments. *Id.* at 425 ("information-seeking highway stops are less likely to provoke anxiety or to prove intrusive"). Here, S.G., a nine-year-old girl, was moved, isolated and interrogated for two hours. Her seizure was far from a brief, casual, information-seeking stop.

## IV. Familial Rights Do Not Evaporate at the Home's Threshold.

Ignoring familial rights' long pedigree, the Solicitor General argues that parents and children do not enjoy the protections envisioned by warrants when they are outside their homes. *See* Brief for the United States at 22. After all, the Solicitor General notes, the Fourth Amendment allows arrests outside the home without warrants. *Id.*

The Solicitor General is correct; juveniles can be *arrested* without warrants under the logic of *Watson* when they are outside their homes. But this does not mean that young toddlers and children of tender years can be summarily snatched from sidewalks and schools. It cannot mean that government agents can constitutionally wait at the curb for school-age

children to emerge, and then spirit them away for incommunicado interrogation. If this were the case, then the constitutional right to "family" would mean nothing more than the right to stay home.

As the framers of the Model Act of 1968 well knew, removal and arrest are different. They developed along different historical paths. They advance different ends. Delinquent children and dependent children, in short, are different.

"Juvenile delinquents" present a small class of children. This class is necessarily limited to minors who have matured beyond tender years; young children simply cannot commit crimes or be delinquent. Further, Due Process demands that criminal statutes be clear, *see, e.g., Skilling v. United States,* 130 S. Ct. 2896 (2010), and focus on action rather than mere status.[14] *See, e.g., Robinson v. California,* 370 U.S. 660 (1962).

In contrast, the class of potentially "dependent" children is huge. It encompasses all children in America. Infants, toddlers and young school-age children, like S.G., are all potential targets. This vast universe of potential "status" victims, coupled with mandatory reporting requirements, vague understandings of

[14] Although criminal laws sometimes punish inaction when a duty is present, the vast majority focus on voluntary acts. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2010). This further limits the scope of the net cast by *Watson's* law of arrest and increases the accuracy rate.

"neglect," and undertrained investigators produces a significant error rate within the child protection system. Harold Richman, Director of the Chapin Hall Center for Children at the University of Chicago, lamented ten years ago that the definition of child abuse has "greatly expanded" since the early 1960s, bringing in a large percentage of cases that fall into a "troublesome" gray area.[15] Richman, *supra,* at 221. Simple neglect and emotional maltreatment, Richman explains, "account for almost 60% of all maltreatment." *Id.*[16] The "most startling fact about child-abuse reporting numbers, beyond their size," Richman reported in 2000, "is that most of the reports remain unsubstantiated – that is, they are not substantiated after caseworker investigation." *Id.* at 223.

---

[15] Howard Davidson, Director of the American Bar Association's Center on Children and the Law, has echoed this point: "[a] single incident of a child seemingly left unattended by parental or adult supervision, or when, in an instant, a parent has 'lost their cool' and hit their child, are frequent bases for making reports that cause full-scale . . . investigations." Davidson, *supra,* at 774. "By far," Davidson has noted, "the majority of reports of child maltreatment do not allege that children are in serious and imminent danger. . . ." *Id.* Davidson therefore concludes that "it is time to seriously consider changes in the fundamental ways in which child abuse and neglect are defined and responded to." *Id.*

[16] "Friends, neighbors, and relatives" are responsible for just under one-half of these reports. *See* the United States Department of Health and Human Services Administration for Children and Families, Appendix G: Highlights of Child Maltreatment 2003, http://www.acf.hhs.gov/programs/cb/pubs/cwo03/appendix/appendixg.htm (last visited January 4, 2011).

On average, "60% to 65% of [the] cases [are] *not substantiated*." *Id.* (emphasis added). Even after initial screening and investigation, this preponderance of misinformation has still translated into an unacceptably large percentage of false positives. One authority estimates the percentage of wrongful rescues and removals (not counting temporary seizures, as here) at over 33%. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540, 541 (2004).

Third, protective service investigators are not experts. "In most states, a bachelor's degree in any subject is all that is required to become a public child protective service (CPS) caseworker." Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765, 772 (1999). "After hiring, CPS pre-service training is too often minimal. Pay scales are often very low, morale is frequently poor, and staff turnover is constant." *Id.*

Crime control and dependency are, for all of these reasons, quite different. Extending the distinction between home and public to protective service caseworkers risks, to put it bluntly, disaster. Large numbers of innocent children will be swept into the net of false positives. Families will be destroyed. At bare minimum, any claim *Watson*'s distinction is necessary to protect children must be seriously questioned. It may harm as many children as it helps.

## V. Summary Seizures Are Not Necessary to Achieve a Compelling Interest.

The Fourth Amendment's warrant requirement does not facilitate child abuse. It does not prevent protective service investigators and law enforcement officials from investigating, nor does it stop teachers from questioning children once inside their schools. It simply injects a judicial, neutral decision-maker between executive license and familial integrity. Before government reaches beyond teaching and begins investigating, it should obtain a warrant.

The Fourth Amendment's warrant requirement simply demands that, in the absence of exigent circumstances,[17] *see Mincey v. Arizona*, 437 U.S. 385, 394 (1978), government officials obtain authorization from a neutral, detached magistrate before seizing children. It injects objective decision-making between government's unbridled discretion and familial integrity. If a judge or magistrate agrees, *ex parte*, that probable cause exists to believe a child is, has been, or will be abused, the child can be seized and questioned. *See Newton v. Burgin*, 414 U.S. 1139 (1974). If not, the child and her family are protected from

---

[17] In the present case, time and exigencies were never a problem. As pointed out by the Court of Appeals, Petitioners had several days to seek a warrant. 588 F.3d at 1030 n. 17. Petitioners allowed S.G. to return to her home. Warrants, of course, can be obtained telephonically, *see, e.g., Kalmanson v. Lockett*, 848 So.2d 374, 379 (Fla. App. 2003), and protective service investigators accordingly enjoy a large measure of flexibility.

unauthorized and unnecessary intrusions. Children are protected on both sides of the divide.

Petitioners and their *amici* have presented no empirical evidence to support the charge that warrants impede protective services. This Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978), rejected a similar claim by federal inspectors: "We are unconvinced . . . that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective." In the absence of "any widespread pattern of refusal," *id.*, the Court properly assumed that "the great majority . . . can be expected in normal course to consent to inspection without warrant." *Id.*

Because Petitioners here present no evidence of a "widespread pattern of refusal" on the part of uncooperative parents, nor is there any evidence of widespread investigative failures caused by warrants, Petitioners' claims must be taken with a large grain of salt. Many states continue to operate child abuse systems requiring warrants,[18] yet Petitioners have

---

[18] *See, e.g.*, ALA. CODE § 12-15-125(a) (requiring prior judicial authorization except when immediate removal is "necessary"), ARIZ. REV. STAT. §§ 8-303 & 8-821 (same); GA. CODE ANN. § 15-11-45 (same); N.D. CENT. CODE § 27-20-13 (same); PA. CONSOL. STAT. ANN. § 6324 (same); WIS. STAT. § 48.19(d) (same). *See generally* Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 915-19 (2004).

pointed to no comparative data demonstrating abuse in these states is higher (or lower). There is absolutely no suggestion of any correlation between States' requiring warrants and increased child abuse.

Petitioners effectively admit here that they did not have probable cause to seize S.G.[19] "Hence," the argument goes, "we could not have investigated allegations against S.G.'s father if we were required to obtain a warrant." Of course, no one knows whether Petitioners could have obtained a warrant here, since they never asked.[20] Notwithstanding their concession, it is by no means clear that investigators in similar situations must necessarily be denied warrants. Under *Illinois v. Gates*, 462 U.S. 213 (1983), courts look to the totality of circumstances in order to assess probable cause.[21] Probable cause, like reasonable suspicion, is a "fluid concept." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). "[O]ne determination will seldom be a useful

---

[19] Although Alford claimed in the Court of Appeals that he had probable cause to seize S.G., *see* Ninth Circuit Brief for Alford at pp. 26-28, he has not in this Court. Instead, his (and Camreta's) position is that reasonable suspicion should suffice. Camreta has never claimed probable cause existed.

[20] There was no finding below that Petitioners did not have probable cause. The Court of Appeals ruled only that "applying the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional." 588 F.3d at 1030 (footnotes omitted).

[21] In civil settings this standard may be relaxed. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978).

'precedent' for another.'" *Ornelas v. United States*, 517 U.S. 690, 698 (1996).

Petitioners' demand for a lower standard is premised less on a desire to protect children than to win unbridled discretion. History teaches, however, that license breeds abuse. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (warning that "virtually complete discretion in the hands of the police" cannot be tolerated); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1983). History teaches that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Gault*, 387 U.S. at 18.

The Fourth Amendment's warrant requirement reduces abuse by minimizing errors. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 891 (1991); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 848 (2001); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1493. Filtering child abuse reports through neutral magistrates is even more productive in the protective services context, because social workers tend to be less trained, *see* Davidson, *supra*, at 772, and more immune than police. *See, e.g., Johnson v. Sackett*, 793 So.2d 20, 24 (Fla. App. 2001) (holding that social workers have absolute immunity under state law); *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J., dissenting from denial of certiorari)

(discussing federal immunities available to social workers). Under circumstances like these, requiring antecedent warrants is very likely the only effective deterrent. *See* Stuntz, *Warrants and Fourth Amendment Remedies*, *supra*, at 909.

## CONCLUSION

Should the Court determine that review remains appropriate in this case, the Court of Appeals' conclusion that S.G.'s two-hour seizure and interrogation violated the Fourth Amendment should be affirmed.

Respectfully submitted,

MARK R. BROWN
*Counsel of Record*
303 E. Broad Street
Columbus, Ohio 43215
(614) 236-6590
mbrown@law.capital.edu